No. 22,280

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TRANSATLANTIC FINANCING CORPORATION, a Texas Corporation,

Appellant,

vs.

UNION BANK, a California corporation,

Appellee.

Appeal From a Judgment of the United States District Court, Central District of California, Honorable Manuel L. Real, United States District Judge.

BRIEF OF APPELLEE.

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No. 22,286

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TRANSAMERICA EQUIPMENT LEASING CORPORATION, a Texas Corporation,

Appellant,

vs.

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Appeal From a Judgment of the United States District Court, Central District of California, Honorable Manuel L. Real, United States District Judge.

BRIEF OF APPELLEE.

Introductory Statement.

As will be demonstrated hereinbelow, the appeal consists almost in its entirety of an attack upon the findings of the trial court. Totally ignoring the "clearly erroneous" standard (Rule 52(a), F.R.C.P.), appellant studiously selects and argues only those portions of the evidence favorable to it, contending that because particular findings are or may be contrary to these particular items of evidence, considered separately and without regard for the totality of the evidence, these findings must be wrong. The technique ignores fundamental precepts of federal appeals; more pertinently, it ignores the great bulk of testimony and nec-

essary inferences therefrom. It will necessitate a somewhat extended counter-statement of the case, in order to put the items referred to into context and perspective.

Statement of the Case.

A. Nature and Course of the Proceedings.

The action was filed as one for breach of a "certain written Loan Agreement" annexed to the complaint, alleged to have been entered into by the parties "after numerous negotiations" [Compl. p. 2, R. 3].[1] Execution and delivery of the instrument was admitted, but its claimed character as a binding contract was denied [Ans. p. 1, R. 112].

Defendant alleged that various express conditions precedent set forth in the Loan Agreement had failed to occur [Ans. pp. 2-3; R. 113-114]. Following a special pre-trial conference on the limited question of the rule of damages applicable in the event liability was established [Stip. and Order, October 11, 1965, R. 172] the third cause of action was withdrawn. A regular pre-trial conference was held October 10, 1966 [Pre-trial Conf. Order, R. 215]. At the latter conference, plaintiff sought to rely on both the written Loan Agreement and on an alleged oral agreement between the parties to make the same loan, about a week before, supported by the writing as a memorandum sufficient to satisfy the Statute of Frauds, and defendant contended that the existence of the alleged oral agreement was not in issue under the pleadings and "applicable rules of law" [Pre-trial Conf. Order, pp. 3-4, R. 217-218].

The case was tried for three days, the trial judge admitting evidence referable to both the negotiation

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[1]References to the record transmitted by the clerk will be prefaced by "R"; references to the reporter's transcript of proceedings by "Tr."

of the written agreement referred to in the complaint and pre-trial order and the alleged verbal agreement, over objections addressed to the parol evidence rule [e.g. Tr. 23-24]. At the conclusion of plaintiff's case, plaintiff elected to rely upon the alleged verbal agreement, supported by the Loan Agreement as a memorandum sufficient to satisfy the Statute of Frauds [Tr. 394, 402; see also 421-422, 431].

Judgment was for defendant, and, after plaintiff's motion for new trial was denied [R. 324, 327], it appealed.

B. Disposition of Case in Court Below.

In support of the judgment, the trial judge prepared and signed his own findings of fact and conclusions of law [R. 311-321]. In essence, he found that defendant had verbally offered to make a loan to plaintiff subject to a series of conditions, one of which was that the terms and conditions of the transaction were to be reduced to writing and the writing was to constitute the agreement of the parties [Finds. XI, XIa, R. 316-317]. He found that before plaintiff communicated its assent to the writing the offer was withdrawn [Finds. XII, XIII, R. 318-319], that the terms and conditions for repayment of the loan, an essential part of the contemplated loan agreement, were not agreed upon and were expressly reserved for further negotiation and agreement [Finds. XIV, R. 319] and that particular additional conditions relating to a concurring engineering report and an approving title opinion failed to occur [Finds. XVII, XVIII, R. 319-320]. He thus concluded that any verbal agreement between plaintiff and defendant prior to the writing would be barred and unenforceable by reason of the statute of frauds [Concl. II, R. 320], that the written loan agreement was not binding because prior to plaintiff's as-

sent thereto defendant communicated an oral refusal to make the loan [Concl. III, R. 320], that any offer by defendant to make the loan was withdrawn and the withdrawal communicated to plaintiff prior to plaintiff's acceptance thereof [Concl. IV, R. 321], that the written loan agreement was not binding upon the parties because it reserved for future negotiation and agreement the terms and conditions upon which the loan would be repaid, which terms and conditions were essential terms of the contemplated loan transaction [Concls. V, VI, R. 321], and that defendant was thus not guilty of any breach of contract with plaintiff [Concl. VII, R. 321].

C. Statement of Facts Relevant to Issues Presented for Review.

1. *The parties.* Plaintiff and appellant Transamerica Equipment Leasing Corporation ("plaintiff" herein) is a Texas corporation, with no more than one active principal, formed shortly before the subject transaction occurred, and apparently continued in existence solely for the purpose of prosecuting this litigation. In essence, it was a "shell" corporation formed to handle three-party financing transactions in the oil and gas field [Tr. 19, 89-94]. Witness Chipman was its president and one of its two principal shareholders, the other being inactive [Tr. 18, 89-90].

Defendant and appellee Union Bank ("defendant" herein) is a California corporation, having a separate department for petroleum loans [Tr. 24, 204, 211, 212]. During the latter portion of the period from May, 1962, to August, 1963, witness Fiedorek was acting head of the petroleum department; in August 1963, witness Smith became acting head of the department [Tr. 205, 212-213]. Neither Fiedorek nor Smith had

lending authority and plaintiff had knowledge of this fact; the contemplated loan transaction required approval by Louis Siegel, defendant's senior executive vice president [Tr. 56, 111, 293-294; R. 216]. Witness Breakstone was associate counsel of defendant; his function was that of a lawyer and not of a lending officer [Tr. 363, 391].

Ancora Corporation ("Ancora" herein), plaintiff's customer, was the general partner in a series of limited partnerships having interests in the Citronelle oil field in Alabama. Among these limited partnerships were Citronelle Unit No. 1, Ltd. and Citronelle Unit No. 3, Ltd., referred to in the testimony but not involved in the case, Citronelle Unit No. 4, Ltd., the proposed borrower, and Aladon Company, Ltd., the proposed borrower in a succeeding transaction [Tr. 20, 29-30, 95-96]. One Harold Green was head of Ancora [Tr. 20].

2. *Definition of terms.* Certain technical terms used throughout the trial were defined by the witnesses as follows:

> Reserves—recoverable oil and gas under the ground [Tr. 230].
>
> Primary reserves—reserves which are produced by natural energy present in the oil reservoir, *i.e.,* natural water drive, gas expansion, gravity draining and solution gas expansion. Reserves classifiable as primary may be produced either by means of these natural forces alone, or by these forces in conjunction with ordinary pumping [Tr. 226].
>
> Secondary reserves—those reserves which are produced only by means of some form of energy transmitted to the reservoir from an outside source or surface, such as water injection, gas injection or thermal recovery [Tr. 227, see also 216].

Secondary recovery unit—a group of lessees producing oil and gas by secondary recovery methods from the same reservoir, and distributing the proceeds equitably among the lessees whose wells are used to inject the water or gas and those lessees whose wells are used for production [Tr. 228].

Developed reserves—reserves underlying wells that are drilled and producing [Tr. 220].

Undeveloped reserves—reserves which exist, but which cannot be produced without drilling or providing the means of transmitting the energy necessary for production [Tr. 229]. Undeveloped secondary reserves would thus be reserves which may be recoverable in the future, but only after a secondary recovery operation is established and put into effect [Tr. 231].

Approving title opinion—a term used among oil and gas lawyers to identify the requirement of a lender upon or purchaser of oil and gas properties that it be furnished either with a policy of title insurance or an opinion from a reputable law firm to the effect that the borrower or seller has good and marketable title to the properties [Tr. 386].

Other technical terms appearing in the two engineering reports, Plaintiff's Exhibits 5 and 17, are defined at Transcript pages 234-235 and 258-259.

3. *The critical events.* The evidence focused upon three critical events, a meeting at defendant's offices on August 21, 1963, a series of meetings on September 12 and 13, 1963 and a series of telephone conversations on September 19 and 20, 1963.

(a) Having determined that he would put together a three-way loan transaction among plaintiff, Ancora and defendant, on the basis of a general exploratory

conversation in May, 1963, no commitment having been asked or given at the time [Tr. 24-27, 105, 109-110, Pltf. Ex. 1], Chipman set up a meeting with defendant in Los Angeles on August 21, 1963, and a separate meeting with Ancora in San Francisco on August 22, 1963 [Tr. 32, 36, 120]. Prior to departing Dallas, he prepared a form for a letter of agreement with Ancora [Tr. 120-121, 122, Def. Ex. A] and initiated preparation of compendious implementing documentation, utilizing forms prepared originally for an earlier transaction negotiated by him on behalf of his former employer [Tr. 37-38, 129, 374].

(b) Chipman met with Smith and with Stoltz, also an employee of defendant, as scheduled, and ascertained from them defendant's interest in making a loan, and the basis upon which defendant would consider a loan application [*e.g.*, Tr. 33-36, 111-120, 213-217, 220-221]. He thereafter went to San Francisco, redrafted the pre-prepared letter agreement to delete references to the two wells which plainly could not meet defendant's standards (but not the lease payment schedule), and caused the redrafted instruments to be executed [Tr. 120-124, compare Pl. Ex. 2, Def. Ex. A]. Notwithstanding the definitive character of the letter agreement, neither Ancora nor plaintiff considered itself bound to the other [Tr. 316-317, 328, 410, Pl. Ex. 3, Def. Ex. B, Find. XIX, p. 10, R. 320].

(c) During the following three weeks, while an engineering report on the wells was being prepared by Fiedorek, Chipman continued with his predocumentation of the transaction, causing copies of the documents between plaintiff and Ancora to be executed and deposited with his attorney for retention in trust until the closing, and furnishing unexecuted copies of some of these documents to defendant [Tr. 37-38, 39, 40, 42,

43, 44, 46, 51, 134, 142-143, 364-366, Pl. Ex. 4, see also Pl. Exs. 7, 9, 10].

(d) On September 12 and 13, 1963, Chipman returned to Los Angeles to meet with defendant, review proposed documentation, and obtain approval of the proposed loan transaction [Tr. 283, but see 48, *et seq.*] At this time, defendant advised him that the Fiedorek report, although it described reserves sufficient to support the loan, could not be used alone because of objections that might be raised in view of Fiedorek's status as a consultant to the bank. A further report was required [Tr. 55, 58, 286-288, 290]. Schafer Engineering of Dallas, Texas, was consulted and the required arrangements were made [Tr. 59, 290, 295]. Because defendant had originally approved Fiedorek, and because Chipman reacted bitterly to the imposition of the further requirement, defendant undertook to pay Schafer's fee [Tr. 58, 59, 288, 293, 353]. Siegel testified that he told Chipman that if Schafer concurred with Fiedorek defendant would consider the loan [Tr. 354]; other witnesses said that the statement was to the effect that the loan would be made [Tr. 58-59, 293].

(e) During the balance of the series of meetings, because Chipman continued to press for a commitment and for the earliest possible closing [Tr. 313, 353, 379, see also Pl. Ex. 16], considerable time was spent on documentation. The written Loan Agreement was blocked out, and Breakstone agreed to cause it to be typed and to be sent to Chipman in Dallas, to be held by him pending Breakstone's arrival there on other business [Tr. 50-54, 144, 380-381, Pl. Ex. 11]. Chipman's proposed documentation was approved as to form, subject to such substantive changes as might be required in order to conform it to the final provisions of the loan agreement [Tr. 364-367, 374-375, see also

391]. Because of difficulties relating primarily to the disposition to be made of Ancora's first payment of $22,920.00, which both plaintiff and defendant wanted to retain, and the manner of payment of defendant's loan fee of $11,550.00, no repayment schedule was established, and the entire subject was reserved for further discussion [Tr. 324-325, 383-384, 391, Pl. Ex. 11(iii), see point I, *infra*]. Breakstone outlined to Chipman the balance of defendant's requirements for closing (*i.e.*, title opinion, certificates, releases, etc.) [Tr. 380, 385] and Chipman returned to Dallas to await Schafer's findings, meanwhile continuing with his work on documentation [Tr. 59]. In the event Schafer concurred and the loan was to be made, a "closing" was scheduled at Chipman's request for Mobile, Alabama, on September 23, 1963 [Tr. 144, 369, 378-380].

(f) The proposed written Loan Agreement was prepared, executed on behalf of defendant, and mailed to plaintiff. Chipman signed the original and placed it and all copies in his file [Tr. 77, 78, 144-145, Pl. Ex. 11, 11(iii)].

(g) On September 19, 1963, the day before Chipman's deadline [Tr. 318, 378-379, see also 277], Schafer advised Smith by telephone that he did not concur with Fiedorek in his evaluation of the subject wells; he stated that he confirmed the values ascribed to the primary reserves but disagreed as to the secondary reserves. As to the latter, he found no basis for assuming, as had Fiedorek, that a secondary recovery unit would commence operations January 1, 1966, and could not on the basis of the data available to him confirm the validity of the secondary recovery efficiency factor that Fiedorek had used. He said the efficiency factor could possibly be confirmed by further research, but

until some unit was formed the date secondary recovery operations commenced would obviously be a matter of pure conjecture. Notwithstanding, Schafer submitted, in case defendant "was interested in that", his estimate of the value of the "possible" secondary reserves, and confirmed his entire report in writing [Tr. 261-263, 265, 298, 299-300, 319-322, Pl. Ex. 17, see also point IV, *infra*].

(h) On September 19, Smith telephoned Chipman and advised him that defendant was unwilling to make the loan because Schafer had not concurred with Fiedorek in respect to the evaluation of the secondary reserves [Tr. 61-64, 300-301, Pl. Ex. 24]. Chipman frantically telephoned Fiedorek [Tr. 72], Schafer [Tr. 72, 268] and telephoned Breakstone twice, the second time with his attorney on the line [Tr. 73, 147, 370, 372, Pl. Ex. 25]. Although Siegel, concerned with what Breakstone considered "veiled threats" of litigation, told Smith and Breakstone that the loan was not to be made under any circumstances [Tr. 357, 360, Pl. Ex. 29, but see Tr. 305], this was not communicated to Chipman; rather, he was invited to obtain and furnish further engineering data if he so desired [Tr. 80, 306, 307, 308, 321, but see 74, 75]. Had Schafer, on the basis of further investigation, concurred with Fiedorek, defendant, reluctantly because of Chipman's litigious attitude, would have made the loan [Tr. 322, 360]. No further engineering data was sought [Tr. 277]. Instead, Chipman attempted unsuccessfully to obtain the loan elsewhere [Tr. 80, 158-161].

ARGUMENT.

I.

The Parties Expressly Reserved for Future Negotiation and Agreement the Terms and Conditions Upon Which the Subject Loan Would Be Repaid. These Were Essential Terms of the Loan Transaction. Accordingly, the Purported Agreement Was Not Binding Upon the Parties. The Judgment Below Must Be Affirmed on This Basis Alone.

The trial court found that defendant verbally offered to lend $600,000 to plaintiff on six wells, on various terms and conditions, one of which was:

> "(d) Said loan . . . was to be paid in installments over a period of 42 months *according to a schedule to be worked out and mutually agreed upon by and between plaintiff and defendant.*" (emphasis supplied). [Find. XI, pp. 6-7, R. 316-317].

It further found that

> "(g) Any proceeds of production received by defendant by virtue of the . . . assignment of runs would be applied, first, to the monthly payment on the fee note, second, to the monthly payment on the principal note, not exceeding, however, *the monthly payment set forth in the schedule to be agreed to by and between the parties,* and third, after deducting an amount or percentage for operating expenses to be agreed upon by the parties, to a special reserve account not to exceed $75,000, . . ." (emphasis supplied). [Find. XI(g), R. 318].

From this it concluded:

"V

"The written loan agreement, dated September 18, 1963, is not binding upon the parties because it reserves for future negotiation and agreement of the parties the terms and conditions upon which the subject loan would be repaid, which said terms and conditions of repayment were essential terms of the contemplated loan transaction." [Concl. V, R. 321].

Plaintiff's attack on the foregoing findings and conclusion is two-pronged; it contends that all that was left for future determination was an internal allocation by defendant of plaintiff's payments, and that this allocation was not an essential term of the contract (App. Op. Br. p. 6). Much of the evidence adduced at the trial was directed to this issue. Notwithstanding its duty to prove the findings "clearly erroneous", plaintiff has made no effort to summarize or analyze any of the evidence and its arguments blithely ignore the findings. Even though specifically rejected by the trial court's findings of fact, plaintiff's contention is argued as if no such findings exist.

It is, of course, the duty of an appellant, when challenging the substantiality of the evidence to support findings made by the trial court, to fairly set forth *all* the material evidence, not merely its own partisan version of what came before the trial court. (*Conderback, Inc. v. Standard Oil Co.,* 239 Cal. App. 2d 664, 687, 48 Cal. Rptr. 901 (1966); *Atlas Terminals, Inc. v. Sokol,* 203 Cal. App. 2d 191, 209, 21 Cal. Rptr. 293 (1962). This court is not required to search the record to uncover support, if any, for an appellant's claim that findings lack evidentiary support (*e.g., Green v. Green,* 215 Cal. App. 2d 31, 35, 30 Cal. Rptr. 30

(1963), and cases there cited), nor can such a duty be thrust upon appellee (*Wiley v. Wiley,* 183 Cal. App. 2d 588, 591, 7 Cal. Rptr. 73 (1960); *Hickson v. Thielman,* 147 Cal. App. 2d 11, 14-15, 304 P. 2d 122 (1956).

California courts, applying a standard of appellate review of findings comparable to that of Rule 52(a), F.R.C.P., hold that where an appellant defaults in his burden of presenting to the court a fair statement of the evidence, it has waived its claim that findings are not supported by substantial evidence (*Rogers v. Whitson,* 228 Cal. App. 2d 662, 674, 39 Cal. Rptr. 849 (1964); *Arditto v. Putnam,* 214 Cal. App. 2d 633, 640-641, 29 Cal. Rptr. 700 (1963); *Zint v. Topp Industries, Inc.,* 184 Cal. App. 2d 240, 243, 7 Cal. Rptr. 302 (1960); *Murphy v. Hartford Acc. & Ind. Co.,* 177 Cal. App. 2d 539, 542, 2 Cal. Rptr. 325 (1960), and is foreclosed from questioning the sufficiency of the evidence to support the findings (*McKeon v. Santa Claus, etc., Inc.,* 230 Cal. App. 2d 359, 362-363, 41 Cal. Rptr. 43 (1964)).

A repayment schedule for a petroleum loan must accommodate the borrower's desire to retain surplus revenue, the lender's desire for substantial payments and adequate collateral, and the declining productive capacity of the wells. Thus, the engineering report and its projection of cash flow becomes critical [Tr. 107, 325-326]. Chipman prepared his first proposed schedule before his August trip, before any engineering projection was available, and prepared further proposed schedules as information was developed [Tr. 109, 112, 122]. Until Schafer confirmed Fiedorek's cash flow pro-

jections, and the parties agreed on the disposition of all lease payments, it would have been premature to attempt to prepare a final schedule.

Very substantial areas of disagreement existed. Ancora's first payment to plaintiff was $22,920.00; with respect to this payment Breakstone testified:

> "Well, when we were in Mr. Smith's office discussing the loan there was a considerable hassle over the repayment of the loan and as to the schedule.
>
> "The first problem was Mr. Chipman wanted the first payment for himself. Mr. Smith indicated that he would like to have the bank have it. Mr. Chipman stated that he wanted the first payment which was part of his commission in putting this deal together for Ancora and that based on the schedules that he worked out, that he, Mr. Chipman had worked out, the bank would be paid in 42 months. Mr. Smith did not agree to give up that first payment that Mr. Chipman was talking about." [Tr. 383].

On the same subject, Smith testified:

> "Q. Do you recall, Mr. Smith, any discussion between you and Mr. Chipman on September 12 or September 13, 1963 with regard to the question whether the first installment payment on the lease and promissory note from Ancora to Transamerica should or should not be paid to Union Bank in repayment of its loan? A. Yes, there was some discussion about who would get the first payment.
>
> Q. Do you recall what that discussion was? A. Transamerica wanted that first lease payment so that they wouldn't have to wait until the tail end of this thing to realize any cash. I was not convinced that we should give that up to them.

Q. Did you indicate to Mr. Chipman that you were not convinced that you should give it up to them? A. Yes, I did. This was something that was going to be negotiated, the first lease payment.

Q. To your knowledge was that point resolved? A. It was not resolved. No, sir.

Q. What was the amount of that first lease payment? A. I believe it was $22,000." [Tr. 324-325].

On the subject of the defendant's loan fee, Mr. Breakstone testified:

"Then secondly we executed for compensating balances a fee note of $11,550 which was to be incorporated into the schedules and to be paid in 42 equal installments. This was discussed in great detail. There was some discussion in the beginning that we would have Chipman pay the $11,-550 off the top if he was going to take the first payment, he could pay us the loan fee right off the top. He didn't want to do that, he wanted to stagger it. We discussed it but never came to any conclusions as to how it should be done. This was one of the items which Mr. Chipman discussed with me late in the afternoon on Friday the 13th, September, 1963 when we were discussing the loan agreement." [Tr. 384].

Mr. Breakstone thus concluded:

"We left the matter of the schedule open because we couldn't agree on it. He didn't know how he wanted to do it, he wanted to think about it. He said he would prepare a new schedule and send it to us for our consideration." [Tr. 384].

Plaintiff's arguments totally disregard the foregoing testimony, which was uncontradicted.

Following the conversation referred to, Breakstone prepared and transmitted to Chipman the proposed written Loan Agreement, which provided *inter alia* as follows:

> "3. Said loan, evidenced by the aforesaid promissory note, shall be paid in installments over a period of forty-two (42) months *according to a schedule to be worked out and mutually agreed upon by and between the parties hereto.*" (emphasis supplied) [Pl. Ex. 11(iii), p. 2].

Plaintiff's various proposed payment schedules [*i.e.*, Pl. Ex. 4(a), 16 and 21] were not only not agreed to; they were plainly insufficient to provide for the payment of the loan during its term. Had defendant received the first 42 note payments and lease payments 2 through 43, as plaintiff proposed, it would have received a total of $670,255.94 [Pl. Ex. 4(a), p. 3]. Plaintiff's computation of the amount needed to repay its loan was $683,050 [Tr. 323], a difference of almost $13,000. The schedule proposed in plaintiff's Exhibit 16 fell $16,600 short [Tr. 414]. Plaintiff suggested in oral argument and suggests now in argument (App. Op. Br. 38) and in the schedule annexed to its brief[2] that the matter could be handled by a "balloon" payment of $16,406 in the last month [Tr. 399]. Ancora's payment to plaintiff during this month was to be only $7,843.94 [Pl. Ex. 4(a), p. 3]; plaintiff furnished no indication that it would or could make up the deficiency, and there was no evidence that defendant was willing to proceed on the assumption that a source of payment of the deficiency would be found.

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[2]The source of this schedule is not apparent. It was not an exhibit in evidence or otherwise referred to at the trial. Plaintiff apparently created it for the purpose of its brief (App. Op. Br. p. 28).

Plaintiff argues that Ancora assigned to it all of the runs, and that it in turn proposed to make an equivalent assignment to defendant. From this it apparently concludes that all of the scheduled payments were *minimum* payments and that if anything was to be determined, it was solely a matter of internal allocation of the gross payments (App. Op. Br. pp. 4-5, 21-26). This construction of the instruments would undoubtedly shock the parties, particularly Ancora, the borrower.

In the first place, although a full *security interest* in the runs was to be transferred [Pl. Ex. 4(a), p. 10, see also App. Op. Br., pp. 4-5][3], the transfer was to be made only as security for the indebtedness described. The indebtedness consisted of two items, the lease payments described in Exhibit 4(a), page 3, Subp. (a), and the installment note payments described in the same exhibit, page 3, Subp. (b). The lease referred to was in evidence as Exhibit 4(b) and the installment note as Exhibit 4(d).

All of these instruments refer to fixed payments and not to minimum payments, as plaintiff would now have us believe. The note contains no "on or before" clause.

Plainly, the parties contemplated that surplus monies would go not to defendant, as plaintiff now contends, but to plaintiff or Ancora. That this is so is clearly demonstrated by the Loan Agreement [Pl. Ex. 11(iii)], which provides in Paragraph 8, pages 3-4, as follows:

> ". . . both notes shall be paid monthly out of runs from the producing properties mortgaged and assigned to Bank. Application of proceeds there-

[3]The abstract quoted at Appellant's Opening Brief, pages 4-5, is inaccurate. The quoted language is found in Exhibit 4(a), not in 4(d), and omits without indication one-half page of text following the word "Mortgagee" in the first line of Appellant's Opening Brief, page 5.

> from shall be as follows: First on the monthly payment due on Note 'B,' and the balance remaining to be applied first on interest and then on principal as to Note *'A,' not exceeding, however, as to Note 'A,' the monthly payment set forth in the schedule* to be agreed to by and between the parties hereto. After application of proceeds as aforesaid, any excess remaining in any given month after deducting therefrom a given amount or percentage for operating expenses shall be retained by Bank and deposited in a special reserve account for Borrower, provided, however, that *said reserve account shall at no time be in excess of Seventy-Five Thousand Dollars* ($75,000.00). . ." (emphasis supplied).

If plaintiff's contention were correct, the limitation imposed upon the amount of the payment on Note "A" and the further limitation on the amount of the reserve would be meaningless.

Further, defendant was not even party to the documentation upon which plaintiff's analysis is based. Only Ancora and plaintiff were party to Exhibits 4(a), 4(b), 4(c) and 4(d). Breakstone approved unexecuted copies of these as to form, but testified that insofar as matters of substance were concerned, the Loan Agreement would control and these documents might require amendment by interlineation to conform to it [Tr. 364, 367, 374-375, 391]. In approving the documentation Breakstone was acting in his capacity as an attorney, and did not have authority to bind the Bank [Tr. 363, 391]. Similarly, the proposed documentation by which plaintiff's rights were to be transferred to the Bank [Pl. Exs. 21, 22 and 23], although similarly reviewed in blank by Breakstone and approved by him as to form [Tr. 364-366], was subject to change with re-

spect to matters of substance [Tr. 367, 374-375]. The principal substantive matter left open for determination at the time, and therefore the matter most likely to cause changes in the pre-documentation, was the matter of the payment schedule [*e.g.*, Tr. 383-384].

Admitting that the trial court found to the contrary, plaintiff argues (App. Op. Br., 27-28) that the parties treated the schedule as a matter of no importance. The argument flies in the face of all of the evidence on the subject. The necessity for agreement on the schedule was referred to in two different places in the Loan Agreement (Paras. 3 and 8). It was the subject of an extended discussion among Chipman, Breakstone and Smith [Tr. 325, 383-384]. The agreement on September 13 was that Chipman was to think about the Bank's proposal, prepare a new schedule and send it for consideration [Tr. 384]. Until he did so there was no reason for Smith to discuss the matter with anyone. There was no logical reason for the subject to be discussed in memoranda or in conversations devoted to other subjects.

The terms of repayment are, of course, essential elements of a loan agreement. No bank will lend money unless a borrower is under a clear, definite and legally enforceable obligation to repay. Where, as here, an essential element of an agreement is expressly left open to future negotiation and agreement, the court may not supply the missing terms or remove the uncertainty. It will not imply or speculate as to what the parties might have agreed to, or substitute terms of its own, however reasonable. It will not enforce the "Agreement" or award damages for its breach.

Ablett v. Clauson, 43 Cal. 2d 280, 272 P. 2d 753 (1954);

Autry v. Republic Productions, Inc., 30 Cal. 2d 144, 180 P. 2d 888 (1947);

Levy v. Firks, 222 Cal. App. 2d 429, 433, 35 Cal. Rptr. 207;

Alaimo v. Tsunoda, 215 Cal. App. 2d 94, 29 Cal. Rptr. 806 (1963);

Louis Lesser Enterprises, Ltd. v. Roeder, 209 Cal. App. 2d 401, 404-405, 408, 25 Cal. Rptr. 917 (1962);

Roven v. Miller, 168 Cal. App. 2d 391, 335 P. 2d 1035 (1959);

Roberts v. Adams, 164 Cal. App. 2d 312, 330 Pac. 900 (1958);

Putnam v. Cameron, 129 Cal. App. 2d 89, 276 P. 2d 102 (1954);

Bonk v. Boyajian, 128 Cal. App. 2d 153, 274 P. 2d 948 (1954);

Gould v. Callan, 127 Cal. App. 2d 1, 5, 273 P. 2d 93 (1954);

Colorado Corp., Ltd. v. Smith, 121 Cal. App. 2d 374, 263 P. 2d 79 (1953);

Burgess v. Rodom, 121 Cal. App. 2d 71, 262 P. 2d 335 (1953);

Vangel v. Vangel, 116 Cal. App. 2d 615, 254 P. 2d 919 (1953);

Avalon Products, Inc. v. Lentini, 98 Cal. App. 2d 177, 219 P. 2d 485 (1950);

Bravo v. Sharkey, 97 Cal. App. 2d 883, 218 P. 2d 785 (1950);

Kerr Glass Corp. v. Elizabeth Arden Corp., 61 Cal. App. 2d 55, 141 P. 2d 938 (1943);

Blake v. Mosher, 11 Cal. App. 2d 532, 54 P. 2d 492 (1936);

Dillingham v. Dahlgren, 52 Cal. App. 322, 198 Pac. 832 (1921);

Jules Levy & Bro. v. A. Mautz & Co., 16 Cal. App. 666, 669, 117 Pac. 936 (1911);

Klein v. Citizens Union Nat. Bank, 281 Ky. 650, 136 S.W. 2d 770 (1940);

Smith v. Dotterweich, 116 N.Y.S. 896, 132 App. Div. 489 (1909); rev. other gr. 93 N.E. 985 (1911);

1 Williston on Contracts, Third Ed., §45, pp. 149-150.

Avalon Products, Inc. v. Lentini, supra, is squarely in point. There, the court stated:

> "Where, however, there has been no agreement upon an essential element and the contract provides no means for the determination thereof but leaves it to the future negotiation and agreement of the parties, the contract is void * * * Although a greater degree of certainty is required in a contract which is sought to be specifically enforced, the general rule is that a provison in a contract which leaves open the terms of payment for future negotiation renders the contract incomplete and uncertain in one of its material features, and for that reason unenforceable in equity. * * * In California, the rule is the same and no action will lie to enforce the performance of a contract or to recover damages for its breach unless it is complete and certain. * * *
>
> "The purchase order involved herein specifically provides that the method of payment is to be agreed upon before delivery. An essential element of the contract is thus left to future negotiation and agreement of the parties. If prior to delivery either party should insist upon terms of payment which the other is unwilling to meet neither party

> could enforce the contract. Since appellant repudiated the contract before there was complete agreement, respondent cannot recover damages for its breach." 98 Cal. App. 2d at 179-180.

The decision in *Avalon Products, Inc. v. Lentini,* relating specifically to terms of payment in a credit-sale situation, is but one application of a rule of contract construction well settled in this State. As the Supreme Court stated in *Ablett v. Clauson, supra,* a case involving a controversy with respect to the validity of a clause claimed to confer an option to renew a lease:

> "The general rule regarding contracts to agree in the future is stated to be as follows: 'Although a promise may be sufficiently definite when it contains an option given to the promissor or promissee, yet if an essential element is reserved for the future agreement of both parties, the promise can give rise to no legal obligation until such future agreement. Since either party by the terms of the promise may refuse to agree to anything to which the other party will agree, it is impossible for the law to affix any obligation to such a promise.'* * *" 43 Cal. 2d at 284-285.

In *Autry v. Republic Productions, Inc., supra,* the California Supreme Court stated:

> "There is no dispute that neither law nor equity provides a remedy for breach of an agreement to agree in the future. Such a contract cannot be made the basis of a cause of action. * * * The court may not imply what the parties will agree upon. * * *" 30 Cal. 2d at 151-152.

Two decisions of the California District Courts of Appeal may be said to be the leading cases in support of the above general proposition. The first of these is *Dillingham v. Dahlgren, supra,* an action for damages for breach of a purported contract to sell certain real property to the plaintiff. Here, although a written "agreement" existed, the record showed that the parties intended preparation of a further formal agreement, including additional substantial terms, and the court held that even though where a final contract fails to express some matter, as, for instance, a time of payment, the law may imply the intention of the parties, where a preliminary contract leaves certain terms to be agreed upon for the purpose of a final contract, there can be no implication of what the parties wll agree upon (52 Cal. App. at 329-330).

Accord: *Vangel v. Vangel,* 116 Cal. App. 2d 615, 254 P. 2d 919 (1953).

The other leading California authority is *Kerr Glass v. Elizabeth Arden Corp., supra,* an action for damages for failure to erect a building according to the terms of a lease. Under the terms of the "agreement" in question, the plaintiff had agreed to lease portions of a building to be constructed by the defendant, preliminary plans and specifications were attached to the agreement, and there was a provision that the defendant would prepare final plans and specifications that would be approved by the parties, a provision that such approval would not unreasonably be withheld, and a provision that the final plans and specifications would then become part of the agreement. The Court held that the

foregoing did not constitute an enforceable agreement because essential final terms remained to be agreed upon. The Court refused to engage in any implication as to what the parties would be willing to agree upon in the future.

Accord, *Louis Lesser Enterprises, Ltd. v. Roeder, supra;*
Colorado Corp., Ltd. v. Smith, supra;
Bravo v. Sharkey, supra;
Putnam v. Cameron, supra.

In the case last cited, the Court stated:

> "* * * Where the minds of parties litigant have not met on an essential element of the purpose to be achieved, and they have failed to specify the means for determining such element but have indicated that future negotiations are necessary to effect an agreement, the abortive effort, however labeled, is void * * *" 29 Cal. App. 2d at 95.

The general rule above enunciated has had application in a variety of situations analogous to that involved in the case at bench.

Thus, *Roberts v. Adams, supra,* involved a lease from Adams as lessor to Roberts as lessee, containing an option reading as follows:

> "It shall be a condition of this tenancy that the Lessee, Charles Roberts, shall have the option to purchase the said property as per Map recorded in Book 19, pages 1-34, for the total sum of $85,000.00, *payable as mutually agreed by both parties.*" (Emphasis by Court.)

There was testimony that there were certain conversations about terms of payment, but the evidence showed that these conversations (if they occurred) were merged

into the writing when, at defendant's request, plaintiff placed in the agreement the phrase "payable as mutually agreed by both parties". On these facts the Court held that in the absence of any internal or external indicia of what the parties would have agreed upon, the Court could not supply the omitted provision, for that would amount to making a contract for the parties. Its decision, it stated, was an application of the firmly established law of California that failure to specify or furnish a standard for determination of terms of payment and method of securing the unpaid balance of the purchase price of real or other property is fatal to its enforceability, notwithstanding any desire of the courts to be liberal and helpful. (164 Cal. App. 2d at 315).

A clear distinction is made by the cases between the situation where an uncertainty exists that can be cured by the Court either by reference to extrinsic evidence or by implication as to what the parties would have agreed upon and an item reserved for further negotiation and future agreement of the parties. In the latter situation, the Court will not seek to determine what the agreement of the parties would have been, but rather holds their contract to be incomplete and unenforceable.

Roberts v. Adams, supra;
Jules Levy & Bro. v. A. Mautz & Co., supra.

Plaintiff relies upon various decisions which are fully consistent with the general rule of law set forth hereinabove. Moreover, these cases also uniformly hold that the time and manner of payment is an essential term of any agreement where credit is extended. We have found and plaintiff has cited no cases to the contrary.

City of Los Angeles v. Superior Court, cited by plaintiff at page 22, distinguishes between so-called "essential elements" and matters deemed unessential. The matters there left to the future agreement of the parties were plainly minor in light of the principal purposes of the contract involved and bear no analogy to the matters here reserved for future agreement. In following the decision in *City of Los Angeles,* the Supreme Court stated in *Metropolitan Water District v. Marquart,* 59 Cal. 2d 159, 28 Cal. Rptr. 724, 379 P. 2d 28 (1963) that the rule is that

> "Although a promise gives rise to no legal obligation if an essential element is reserved for future agreement, the enforceability of the contract containing a promise to agree depends upon the relative importance and severability of the matter left to the future . . ." (59 Cal. 2d at 194).

Plainly, in a loan transaction the mode of repayment is neither severable nor non-essential. See also *Pacific Hills Corp. v. Duggan,* 199 Cal. App. 2d 806, 19 Cal. Rptr. 291 (1962), distinguishing *City of Los Angeles* on this basis.

Wong v. Di Grazia, cited by plaintiff at page 23, dealt with "a minor possible ground of disagreement in an otherwise complete agreement", as plaintiff points out. Further, it dealt with a very remote contingency, the possibility that a concededly non-essential term of the contract might not be agreed upon within the period fixed by the rule against perpetuities. The Court's resolution of this question is of no assistance in dealing with the problem faced in the case at bench.

Mancuso v. Krakov, discussed at page 23, does not assist plaintiff. No essential terms was left open for future agreement, but rather, the Court's comments have reference to the computation of the total price of goods, based upon fixed and readily determinable elements.

Burrow v. Timmsen, discussed at page 24, involved not an agreement to obtain a loan but rather, a routine land sale transaction wherein the seller agreed to take back a note and deed of trust. As the abstract quoted by plaintiff discloses, the essentials of the agreement, the amount of the trust deed *and the terms of payment,* were agreed upon, and the Court deemed it proper to imply matters, not expressly provided for, which had become established canons of real estate law.

Stockwell v. Lindeman, discussed at page 25, is to the same effect; it is to be noted that the opinion expressly indicates that in a credit transaction the time and manner of payment is an essential term that must be agreed upon.

Plaintiff's cases illustrate the rules applicable in credit transactions involving the sale of land. While all details of the contract need not be set forth with particularity, the essential terms must be and the time and manner of payment constitute essential terms. The teaching of these cases is clear and the analogy obvious; in a contract for a loan as in a contract for the sale of land on credit, the time and manner of payment constitute essential terms and if these are left to the future agreement of the parties themselves the contract is uncertain and therefore unenforceable.

II.

Reliance Upon Any Oral Agreement Is Precluded by the Statute of Frauds.

A. Plaintiff Having Changed Its Theory of Its Case After All Evidence Was in, Defendant Had No Opportunity to Raise the Statute of Frauds and Cannot Be Held to Have Waived It by Failing to Do So.

It is the law, as plaintiff suggests, that a defendant waives its right to rely upon the statute of frauds by failing to demur to the complaint, failing to object to the introduction of evidence to prove the oral contract at the trial, or by failing to make a motion to strike such evidence.

> *E.g., Pao Ch'en Lee v. Gregeriou,* 50 Cal. 2d 502, 326 P. 2d 135 (1958).

Waiver, of course, consists of the voluntary relinquishment of a known right and presumes the existence of an opportunity to act. Nothing in the record reflects any voluntary relinquishment of any right by defendant to rely upon the statute, nor does it indicate any opportunity given to defendant to voice any such objection. To the contrary, the record demonstrates that plaintiff's reliance upon an oral contract was in the nature of an afterthought, after evidence properly admitted was in and the opportunity to move to strike such evidence had passed. Thus:

1. Plaintiff's complaint was based upon alleged breach of the *written loan agreement,* attached to the complaint as an exhibit, and incorporated by reference therein (Complaint, paragraphs II, V. First Cause of Action; VII, Second Cause of Action; IX, Third Cause of Action; R. 3, 4, 5).

2. At the pre-trial, for the first time, plaintiff contended that there was an oral agreement, *and a written*

memorandum thereof sufficient to obviate any objection based upon the statute of frauds [Pretrial Order, Par. VIA, pp. 3-4, R. 217-218], and defendant argued that even this contention was outside the issues framed by the pleadings [Pretrial Order, Pars. VI, VII-I, pp. 3, 8, R. 217-222]. At this juncture, plaintiff made no contention that it relied upon an oral agreement, independent of the "loan agreement".

3. At the trial, evidence as to the negotiations and discussions of the parties came in, properly, *over defendant's objection* [Tr. 23-24] as bearing upon the identity of the subject matter of the contract, to explain the meaning of the ambiguous, abstruse, and technical terms used, and to demonstrate the intention of the parties in the light of the circumstances existing at the time of execution (see, *e.g., Ellis v. Klaff*, 96 Cal. App. 2d 471, 476, 216 P. 2d 15, (1950)). Indeed, in articulating his objection counsel for defendant specifically acknowledged the propriety of admitting such evidence for this limited purpose.

4. After plaintiff rested, the court asked counsel for plaintiff to make an election between the written contract and the oral contract and, after hesitating, counsel stated that he relied on the oral agreement. When the court stated that reliance on an oral contract was precluded by the statute of frauds, counsel replied that the statute was inapplicable not because of any waiver but because of the written memorandum (the "Loan Agreement") signed by defendant, the party to be charged [Tr. 402, 431]. Plaintiff continued to so contend in its post-trial memorandum [p. 16, lines 14-21, R. 270].

5. In its post-trial memorandum, *for the first time*, plaintiff suggested the possibility that it could rely upon the oral discussions of the parties as constituting an

oral agreement, without reference to any written memorandum [p. 17, lines 11-13, R. 271].

In other words, plaintiff contended for the first time after the trial had ended that evidence properly admitted to explain and clarify the written Loan Agreement should be utilized to find an oral contract, not supported by any written memorandum, and now contends that defendant cannot assert the statute of frauds because it had not objected to the admission of such evidence on this basis. Until plaintiff announced its intention to rely upon the claimed oral agreement, independent of any written memorandum, there was no occasion for defendant to assert the statute. Manifestly, defendant cannot be held to have waived the statute by having failed to make a premature objection to evidence then admissible, because plaintiff failed to complete the proof and belatedly changed its theory.

E. K. Wood Lumber Co. v. Moore Mill & Lumber Co., 97 F. 2d 402, 408 (9 Cir. 1938);

San Francisco Brewing Corp. v. Bowman, 52 Cal. 2d 607, 618, 343 P. 2d 1 (1959);

Gard v. Ramos, 23 Cal. App. 303, 304, 138 Pac. 108 (1913);

See also:

Ellis v. Klaff, 96 Cal. App. 2d 471, 474, 216 P. 2d 15 (1950).

"The evidentiary consequences of the statute of frauds (Civ. Code, §1624) are in many respects similar to those of the parol evidence rule (Code Civ. Proc., §1856). Both require exclusion of extrinsic evidence which would vary, contradict, or add to the terms of the written agreement under consideration (*Craig v. Zelian,* 137 Cal. 105 [69 P. 853], statute of frauds; *Germain Fruit Co. v. Armsby Co.,* 153 Cal. 585 [96 P. 319], parol

evidence rule), but both permit reception of such evidence to identify the subject matter of the contract from the written description, explain the meaning of ambiguous, abstruse, or technical expressions, and assist in interpreting the expressed intentions of the parties in the light of circumstances existing at the time of execution. * * * It must be recognized, however, that there is a basic distinction between the two rules, which, in certain circumstances, becomes of controlling significance.

* * *

"The statute of frauds, on the other hand, is designed to prevent fraud and perjury by requiring certain contracts to be evidenced exclusively in writing. In order to effectuate that purpose, it demands that every material term of an agreement within its provisions be reduced to written form, whether the parties desire to do so or not. To be sufficient, the required writing must be one 'which states *with reasonable certainty,* (a) each party to the contract . . . and (b) the land, goods or other subject-matter to which the contract relates, and (c) *the terms and conditions of all the promises* constituting the contract and by whom and to whom the promises are made.' * * * Unless the writing, considered alone, expresses the essential terms with sufficient certainty to constitute an enforceable contract, it fails to meet the demands of the statute. * * * Accordingly, where the statute of frauds, rather than the parol evidence is invoked, it follows that recovery may not be predicated upon parol proof of material terms omitted from the written memorandum, even though the oral understanding is entirely consistent with, and in no way tends to vary or con-

tradict, the written instrument. * * * In the words of the Supreme Court, 'The whole object of the statute would be frustrated if any substantive portion of the agreement could be established by parol evidence.' * * *" (*Ellis v. Klaff, supra,* 96 Cal. App. 2d at 475-477, emphasis by court).

B. Plaintiff May Not Rely Upon the Loan Agreement as a Memorandum Satisfying the Requirements of the Statute of Frauds.

Plaintiff, if we comprehend its present position correctly, is seeking to rely upon Siegel's categorical statement that plaintiff "has itself a loan" as a contract and upon the Loan Agreement [Ex. 11(iii)] as a written memorandum satisfying the statute of frauds, if such a memorandum be required. The dilemma thus created may not be escaped. The memorandum conclusively demonstrates the absence of a contract (Point I, *supra*), and absent a memorandum, the contract is invalid (Cal. Civ. Code §1624).

Plaintiff's effort to fill in the gaps by means of the reference in the Loan Agreement to other documentation is unwarranted. For example, plaintiff's contention to the contrary notwithstanding, there was and is no reference to Exhibit 22, the proposed Assignment of Equipment Lease, Promissory Note and Mortgage Lien, the only document purporting to transfer the promissory note or any interest therein.

C. The Trial Court Did Not Misapprehend Evidence Bearing on the Alleged Oral Agreement.

Plaintiff suggests that the trial court misapprehended the evidence bearing on the oral agreement when

it commented that Chipman himself testified that he did not think he had an agreement with defendant when he left the Bank on the 13th (App. Op. Br. p. 20). Plaintiff challenges us to find something remotely resembling this statement in the record.

Without doubt, the Court referred to a statement, not by Mr. Chipman in open court, but rather in the course of his telephone conversation with Mr. Chandler, his attorney, and Mr. Breakstone, on September 20, 1963, a transcript of which is in evidence as Plaintiff's Exhibit 25. Mr. Chipman's characterization of his understanding on the 13th was expressed by him on that occasion as follows:

> "Chipman: 'But, Mr. Sigel made a—I don't like to say commitment—because, I'll use it—but, I'm using it because I don't know of a better word to use at the moment. He did not make a true commitment, eh,—but, nevertheless, Mr. Sigel made a statement—a very positive statement—based on Fiedorek's work—
>
> "Breakstone: 'That's right.' " [Pl. Ex. 25, p. 2]

Casual statements by the court during the course of trial or argument are not equivalent to findings; only the latter may be deemed to constitute the basis of the Court's decision. *Wincar Welders v. Leebrick,* 186 Cal. App. 2d 195, 198-199, 8 Cal. Rptr. 846 (1960). To the extent that the Court relied, even subjectively, upon Chipman's belief, its decision was based not upon myth but upon evidence far more credible than that given by Chipman in Court.

III.

The Finding That the Terms and Conditions of the Contemplated Loan Transaction Were to Be Reduced to Writing Was Supported by Substantial Evidence: the Tender of the Proposed Written Agreement Was Therefore an Offer, Which Could Be and Was Withdrawn.

Both plaintiff and defendant were fully aware that a written loan agreement would be required. In this connection, Chipman testified:

> "Q. Did you and Mr. Breakstone commence the drafting of a loan agreement at that time between yourself and the Union Bank? A. I don't recall that we did but a loan agreement was discussed.
>
> Q. Were the terms of it discussed? A. In a general way. The loan agreement was a normal proceeding for the bank, particularly this size a transaction. He recited the documents necessary but I did not see a paper called a loan agreement." [Tr. 53].

Breakstone testified:

> "Q. Did you also have any discussion at that time concerning a written loan agreement? A. Yes. We had decided that there would have to be a loan agreement. He agreed to it.
>
> I started to draft it in outline form for him. I did not have the time, being Friday afternoon. to whip out or to get out, to dictate an agreement.
>
> I discussed with him what would basically go into it. I said I would prepare the agreement and I would have it signed by the bank and mailed to him but there would be conditions in it that would have to be met. He agreed to this procedure. We did this only for the purpose of convenience to

Mr. Chipman because he was emphasizing time was of the essence. I did then prepare a loan agreement on Monday or Tuesday. I believe the following Wednesday it was mailed to him, probably the 18th or 19th of September." [Tr. 380-381].

"It is the rule that where the oral agreement contemplated the execution of a formal written contract by signing, either party has the right to insist on the condition, and mere acts on the part of one who has not signed will not validate the contract. * * * *Spinney v. Downing,* 108 Cal. 666 [41 P. 797], says (p. 688):

> 'It is a general rule to which this case presents no exception that, when it is a part of the understanding between the parties that the terms of their contract are to be reduced to writing and signed by the parties, the assent to its terms must be evidenced in the manner agreed upon or it does not become a binding or completed contract. This is essentially true when, as here, the proposed contract contains reciprocal stipulations and covenants upon the part of each as a consideration for the acts of the other.'

"The foregoing was quoted in the recent case of *Kessinger v. Organic Fertilizers, Inc.,* 151 Cal. App. 2d 741, 749 [312 P. 2d 345].

"Williston says and quotes from *Sparks v. Mauk,* 170 Cal. 122 [148 P. 926], thus:

> 'It may also be supposed that the written contract was made and was signed by but one party, although a signing by both parties was contemplated. " 'It is the undoubted rule that where the contract contemplates the execution of it by signing, either party has the right to insist

upon the condition, and mere acts of performance upon the part of one who has not signed will not validate the contract' " '. (1 Williston on Contracts, 67, §28A.)

"Furthermore a contract in writing signed by the parties takes effect only on delivery. * * *

"Section 1933 of the Code of Civil Procedure reads: 'The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.'

"In re *Quartz Crystal Products Co.,* 71 F. Supp. 949, says that (p. 951): 'The Courts of California and the Circuit Court of Appeals for the Ninth Circuit have held that this section means exactly what it says, i.e., its (sic) means *subscribing not by one party, but by all the parties who are required to sign it and delivering it to the party for whose benefit it is made or delivering it for record so as to make it notice to the world.*' This decision was affirmed by the Ninth Circuit Court of Appeals in 166 F. 2d 1023." (*Amer. Aero. Corp. v. Grand Cen. Aircraft Co.,* 155 Cal. App. (2d) 69, 80-81, 317 Pac. (2d) 694 (1957) [emphasis by court]).

Accord: *Louis Lesser Enterprises, Ltd. v. Roeder, supra,* 209 Cal. App. 2d at 405.

See also:

Apablasa v. Merritt & Co., 176 Cal. App. 2d 719, 726, 1 Cal. Rptr. 500 (1959).

In *Amer. Aero Corp., supra,* the issue was whether the agreement of the parties was the oral agreement found by the court or a different agreement manifested by an unsigned writing. The court found that the parties had agreed that their oral agreement be re-

duced to writing, signed by them and delivered, and that the oral agreement, *as made*, was not reduced to writing. The writing prepared did not reflect the agreement of the parties and, hence, the defendant refused to sign it. *Both* parties proceeded to perform but their performance was of the oral contract and not the proposed writing. The result was that the oral agreement remained binding (155 Cal. App. 2d at 83, quoted by plaintiff at page 31). Here, the court has found an *offer* to make a contract, which offer expressly contemplated the preparation of a writing, which writing was to constitute the agreement of the parties with respect to the subject matter thereof. The offer thus expressly excluded the possibility of an oral contract.

Plaintiff could not pick and choose among the elements of the offer of September 13, 1963, selecting those it found acceptable and rejecting those it found unacceptable. It had to accept all of the terms, including those relating to the writing.

Amer. Aero. Corp. v. Grand Cen. Aircraft Co., supra, 155 Cal. App. 2d at 79.

Since one of the terms of the offer contemplated the preparation of a mutually acceptable writing, there was no contract until both parties acquiesced in the form and substance of the writing [Find. XIa, R. 316-317].

The court made no finding as to whether or not there was an oral agreement; in view of its ruling on the statute of frauds issue no such finding was required. The court's determination in that regard is nonetheless evident; any possibility it would find a ver-

bal agreement to have existed was plainly excluded by the express finding that defendant made a verbal *offer* to enter into a contract on a series of conditions, one of which was that

> "All of the terms and conditions of the contemplated loan transaction were to be reduced to writing and said writing was to constitute the agreement of the parties with respect to the subject-matter thereof." [Find. XIa, R. 316-317].

IV.

Non-Occurrence of Conditions Precedent to Defendant's Duty to Make the Loan Was Not Excused.

The trial court found that:

> "The engineering report prepared by Schafer Engineering, Petroleum Engineers, Dallas, Texas, did not concur with the aforesaid engineering report . . . (sic) prepared by Eugene C. Fiedorek, Dallas, Texas." [Find. XVII, R. 319].

The finding was plainly supported by substantial evidence [*e.g.,* Tr. 261-263, 320, compare Pl. Exs. 5, 17, and see Statement of the Case, para. C 3(g)].

Although Schafer's written report had not been received by defendant on September 19, 1963, defendant had been fully advised of its contents and of Schafer's non-concurrence on that date [*e.g.,* Tr. 262, 263]. Far from repudiating any contractual obligation it may have had to plaintiff at the time, defendant declined to perform in accordance with the terms of Paragraph 6A of the Loan Agreement, and invited plaintiff to furnish evidence that the condition could be met [Tr. 306-307, 322]. Smith categorically denied Chipman's statement that he had said the loan would not be made under

any conditions [Tr. 308] and Stolz, who had listened to the conversation on an extension telephone, confirmed this testimony [Tr. 409-410]. Smith testified that had the condition relating to the Schafer report been met subsequently, he would have recommended the loan [Tr. 322] and Siegel testified that he would have made the loan, albeit reluctantly [Tr. 360]. Defendant never communicated to plaintiff any refusal to perform the contract if the conditions were met, and certainly never communicated the "distinct, unequivocal, absolute refusal to perform the promise" required by the cases.

E.g.: California C. P. Growers v. Harris, 91 Cal. App. 654, 656, 267 Pac. 572 (1928) and cases cited.

4 Corbin on Contracts, §§973-974, p. 905.

Even if the contract had been repudiated, Smith's expression of willingness to accept a report conforming to defendant's standards before the date set for performance reinstated plaintiff's obligation to tender performance (Cal. Civ. Code, §§1443, 1515).

Moreover, it is fundamental that to maintain its action for damages, plaintiff must prove its ability to perform the express conditions precedent. If plaintiff could not or would not perform, it is entitled to no damages. Its willingness and ability to perform remain conditions precedent in spite of any repudiation by defendant even though a tender of performance may be excused. Plaintiff proved neither its willingness and ability to furnish a concurring report nor its willingness and ability to deliver title to the properties involved. It therefore failed to prove its right to damages.

Gray v. Smith, 83 Fed. 824, 829 (9 Cir. 1897); 4 Corbin on Contracts, §978, p. 924.

V.

None of the Trial Court's Findings Were "Clearly Erroneous"; to the Contrary, the Challenged Findings Were Supported by Substantial Evidence in Each Instance.

A. Finding XIa—the evidence in support of this finding is discussed, and citations to the record are set forth in Point III of this brief, *supra.*

B. Finding XIV—the evidence in support of this finding is discussed, and citations to the record are set forth in Point I of this brief, *supra.*

C. Finding XVII—the evidence in support of this finding is discussed, and citations to the record are set forth in Point IV of this brief, *supra,* and in the statement of the case, para. C3(a). Schafer failed to concur within the time limited by plaintiff [*e.g.,* Tr. 378, 379]. In view of his statement that he could not accept Fiedorek's guess as to the date of unitilization of the subject wells until a plan was adopted, he obviously could never fully concur [Tr. 263]. Schafer testified that with further study he could possibly concur in the postulated efficiency of secondary recovery procedures, but refused to accept without personal verification the results of the independent studies accepted by Fiedorek as valid [Compare Tr. 232-234 with Tr. 265-268]. Thus, Schafer characterized his conclusion as non-concurrence, and Smith, defendant's officer charged with the responsibility of evaluating Shafer's report, so construed the report [Tr. 261, 320]. The trial court accepted this testimony, and rejected Fiedorek's conclusion based upon his summary examination of Schafer's report [Tr. 223-224].

D. Finding XIb finds evidentiary support in the language of Paragraph 6A of the Loan Agreement [Ex. 11(iii); see also Tr. 119, 310-311].

E. Finding XIX—the issue was raised by the pleadings [Complaint, Par. VI, R. 2-3], and Pre-trial Conference Order [Paras. VIB, VIII, IX, and X, R. 219]. The finding is supported not only by Breakstone's testimony [Tr. 378] but also by Smith [Tr. 317], Stolz [Tr. 410], and the letter agreements between plaintiff and Ancora executed after plaintiff's Exhibit 2 [Pl. Ex. 3, Def. Ex. B].

F. Finding XI—the evidence in support of this finding is discussed, and citations to the record are set forth in Point III of this brief, *supra.*

G. Finding IX—the finding plainly relates not only to Exhibit 16, but also to Exhibits 4a through 4d, inclusive, 21, 22 and 23. Thus the reference is to plaintiff's proposal that it retain the first lease payment and payments 44 through 48, assigning payments 2 through 43 to defendant as security and as a partial source of repayment of its loan [see, *e.g.,* Pl. Ex. 21].

H. Finding XV—the evidence in support of this finding is discussed, and citations to the record are set forth in Point I of this brief, *supra.*

Conclusion.

Defendant's shot-gun attack ignores in many instances the findings of the trial court and in almost every instance the substantial evidence underlying the findings. The case was tried with meticulous care by the trial judge, and the decision is in accordance with the evidence. Plaintiff raises no substantial issues of law. Accordingly, the decision below should be affirmed.

Respectfully submitted,

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